the judge in chambers. It might be argued that there is no great objection to pursuing this method. There is, however, a measure of inconvenience involved. Furthermore, the need of breaking off in the middle of presenting a case to the jury, in order to send them from the room, has the effect of taking their minds from the thread of the story, and thus rendering the evidence when presented far less telling than if it were allowed to come in without delay. An addition to the many technicalities of our criminal procedure, which is only necessary because of this mistaken decision,[14] is certainly to be deplored.

ARE PREFERENTIAL VOTING STATUTES UNCONSTITUTIONAL? — How nearly "effective voting" may be accomplished by means of legislation alone is a question upon which the authorities are in confusion. Two late conflicting decisions serve to increase the uncertainty in which the law here finds itself. In each case the plaintiff brought suit to contest the right of the defendant to an elective office. Under a constitution guaranteeing to all electors the right "to vote . . . for all officers that now are, or hereafter may be, elective by the people" the Supreme Court of Minnesota held that a statute providing for preferential voting was unconstitutional. *Brown* v. *Smallwood*, 153 N. W. 953. Upon the same facts and under a substantially similar constitutional provision the Supreme Court of New Jersey reached the opposite conclusion. *Orpen* v. *Watson*, 93 Atl. 853.

The right to vote is not a right inherent in any person but is a political privilege granted by the state to a specified class of electors and is subject to state control and regulation.[1] So the power of a state legislature to effectuate ballot reform is limited only by the negative provision of the Fifteenth Amendment to the federal Constitution [2] and the suffrage guarantees of the state constitution. The court must decide in each case what the constitution of the state does or does not guarantee to the electors.

In determining the power of the legislature to regulate the manner of exercising the elective franchise the courts, as a rule, have been liberal

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[14] McKnight *v.* United States, 115 Fed. 972, 976, probably stands alone. There is some talk in the books pointing toward an exception making notice unnecessary in the case of a criminal defendant where the writing has been clearly traced to his possession, but there is nothing to indicate that to allow such notice would be error. The ground on which the rulings are based is that the accused could not be compelled to produce and therefore notice is useless. Moore *v.* State, 130 Ga. 322, 333, 60 S. E. 544, 548; State *v.* McCauley, 17 Wash. 88, 91, 49 Pac. 221, 222; State *v.* Gurnee, 14 Kan. 111, 120. See 3 RICE, EVIDENCE, § 31; UNDERHILL, CRIMINAL EVIDENCE, 2 ed., § 42. Such reasoning results from a mistaken idea of the purpose of the rule. And the great weight of authority is that notice to produce is necessary as well in criminal as in civil cases. Regina *v.* Kitson, 6 Cox C. C. 159; Regina *v.* Elsworthy, 10 Cox C. C. 579; United States *v.* Winchester, 2 McLean (U. S.) 135; State *v.* Kimbrough, 2 Dev. Law (N. C.) 431; Young *v.* People, 221 Ill. 51, 56, 77 N. E. 536, 538; Snider *v.* State, 78 Miss. 366, 29 So. 78; State *v.* Martin, 229 Mo. 620, 635, 129 S. W. 881, 885; State *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613. See State *v.* Mann, 39 Wash. 144, 148, 81 Pac. 561, 562.

[1] See Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339.

[2] See United States *v.* Cruikshank, 92 U. S. 542, 555.

enough. Thus it is well settled that the legislature may prescribe rules for the proper registration of voters,[3] and for the manner of marking the ballot.[4] Furthermore the privilege of voting "by ballot" [5] is held not to be violated by the innovation of a voting machine, though the result seems to be otherwise where the constitution provides for "written ballot."[6] Nor is a provision that a valid vote must register a choice for a prescribed number of candidates regarded as unconstitutional under the usual constitutional provisions.[7] But when the question concerns the power of the legislature to change the very nature of the vote, that is, its effective character, the courts have been stricter. The fundamental principle to be generally applied is that there must be no discrimination between the various electors; the voting strength of one must be exactly equal to the voting strength of another. The difficulty lies in determining just what constitutes this equality of voting strength. For example, is a statute unconstitutional which allows cumulative voting? The answer to this question should depend primarily upon whether or not a statute is unconstitutional which provides that no elector may record his choice for more than a certain portion of the elective offices. Such so-called "restricted voting" would seem to be clearly unconstitutional when the constitution guarantees to the electors the privilege of voting "for all officers to be elected," [8] though this result would be more doubtful where the constitution merely guarantees the privilege of voting "at all elections." [9] If a restricted vote is unconstitutional, then it would seem that cumulative voting is open to the same objection. For, assuming that an elector has a privilege under the constitution of casting a vote for a candidate for every elective office, it must follow that he has the privilege of registering himself as a full voting unit for each of those candidates. To allow a second elector to register as more than one full voting unit for any one candidate, by cumulating his vote, would seem to impair the constitutional privilege of the first elector. For instance, suppose there are three elective offices to be filled, under a constitution guaranteeing to every elector the privilege of voting for each of the three candidates. Surely this must mean that he may give to each of those candidates one full vote. If, then, another elector has the power to cast three votes for any one candidate it would seem that the system has permitted discrimina-

[3] Capen *v.* Foster, 12 Pick. (Mass.) 485; People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596.

[4] Cole *v.* Tucker, 164 Mass. 486, 41 N. E. 681.

[5] Elwell *v.* Comstock, 99 Minn. 261, 109 N. W. 698; Detroit *v.* Inspectors, 139 Mich. 548, 102 N. W. 1029; Lynch *v.* Malley, 215 Ill. 574, 74 N. E. 723. See 20 HARV. L. REV. 329.

[6] Nichols *v.* Board of Election Comm'rs, 196 Mass. 410, 82 N. E. 50, overruling advisory opinion in *In re* House Bill No. 1291, 178 Mass. 605, 60 N. E. 129.

[7] Farrell *v.* Hicken, 125 Minn. 407, 147 N. W. 815. Note that this case presented also the same situation as did the principal case, but the constitutionality of the preferential ballot was not questioned. See also McEwen *v.* Prince, 125 Minn. 417, 147 N. W. 275; Silberstein *v.* Prince, 127 Minn. 411, 149 N. W. 653.

[8] McArdle *v.* Jersey City, 66 N. J. L. 590, 49 Atl. 1013; Bowden *v.* Bedell, 68 N. J. L. 451, 53 Atl. 198; *In re* Opinion of Judges, 21 R. I. 579, 41 Atl. 1009.

[9] Restricted voting statutes have been held invalid under such a constitutional guarantee. State *v.* Constantine, 42 Oh. St. 437. And see People *v.* Kenney, 96 N. Y. 294. *Contra*, Commonwealth *v.* Reeder, 171 Pa. St. 505, 33 Atl. 67.

tion between the voting strength of the electors. The constitutionality of such a statute may, therefore, well be doubted.[10]

But a statute providing for preferential balloting presents a very different problem.[11] Here every elector has a right to vote for a candidate for every office to be filled. Moreover, in no way can an elector cast more than one effective vote for the same candidate. The ballots of the several electors are allowed exactly the same weight and effect. If a sufficient number of candidates do not receive a majority of first choice votes it is a violation of no right of the electors to declare that a resort may be had to the second choice votes in order to fill the deficiency.[12] The several choices of the several electors receive equal weight. This essential equality being preserved, it matters not that preferential voting was unknown at the time the constitution guaranteeing the right "to vote" was adopted, for the change is merely in pursuance of the undoubted legislative power to regulate the election machinery with a view to obtaining a more accurate registration of the electoral will. So, regardless of the constitutionality of the restricted vote or of the cumulative vote, the Minnesota court seems unnecessarily narrow in its decision invalidating the preferential voting legislation.[13]

RECENT CASES

ALIENS — EXCLUSION OF ALIENS — JUDICIAL POWER OF REVIEW — CONSTRUCTION OF STATUTE. — Under the immigration laws, "persons likely to become a public charge are to be excluded." 34 U. S. STAT. AT L. 898; as amended 36 U. S. STAT. AT L. 263. The petitioners were excluded under this provision by a Commissioner of Immigration on the ground that the industrial

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[10] It has been held unconstitutional. Maynard *v.* Board, 84 Mich. 228, 47 N. W. 756. See State *v.* Thompson, 21 N. D. 426, 443. And see MCCRARY, ELECTIONS, 4 ed., § 212. But see People *v.* Nelson, 133 Ill. 565, 27 N. E. 217.

[11] Under the statutes in the principal cases each elector is allowed to register a first choice, a second choice, and "additional" choices, but each voter may cast only one choice for a particular candidate. Upon the failure of the first choices to elect a sufficient number of candidates by a majority vote the second choices are added in. If still a sufficient number of candidates do not receive a majority of choices the "additional" choices are added in and the candidate receiving the greatest number of choices declared elected.

[12] It will be seen that an elector might give undue weight to his first choice by failing to exercise his other choices, that is, by failing to exercise his complete franchise. But this overweight is an incident of the elector's abuse of the franchise and is attainable under the ordinary system of voting wherever several candidates are to be elected. Moreover, a state may require that no vote be counted unless the elector has exercised his complete franchise. Farrell *v.* Hicken, *supra*, 125 Minn. 407, 147 N. W. 815.

[13] Adams *v.* Lansdon, 18 Idaho 483, 110 Pac. 280, presents a situation similar to that seen in the principal cases, except that the case involved a primary election. Ordinarily a primary election is held not to be an election within the general suffrage provisions of the constitutions. Montgomery *v.* Chelf, 118 Ky. 766, 82 S. W. 388. But the court did not make this point in upholding the law. And see State *v.* Nichols, 50 Wash. 508, 97 Pac. 728, another case of a primary election, but supporting the constitutionality of preferential voting in a strong *dictum*.